

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

**NOTICE OF PUBLIC HEARING
AND
HEARING DRAFT OF PROPOSED RULES**

The Department of Commerce announces that it will hold a public hearing on the attached proposed rules under chapter Comm 3, relating to stop work, stop use and petition for variance procedures.

The public hearing will be held as follows:

Date and Time:

Monday, June 27, 2005
10:00 a.m.

Location:

Room 3C, Thompson Commerce Center
201 West Washington Avenue
Madison

Interested persons are invited to appear at the hearing and present comments on the proposed rules. Persons making oral presentations are requested to submit their comments in writing. Persons submitting comments will not receive individual responses. The hearing record on this proposed rulemaking will remain open until **July 8, 2005**, to permit submittal of written comments from persons who are unable to attend the hearing or who wish to supplement testimony offered at the hearing. Written comments should be submitted to Ronald Acker, Department of Commerce, Program Development Bureau, P.O. Box 2689, Madison, WI 53701-2689, or E-mail at racker@commerce.state.wi.us.

This hearing is held in an accessible facility. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please call (608) 266-8741 or TTY at (608) 264-8777 at least 10 days prior to the hearing date. Accommodations such as interpreters, English translators, or materials in audio tape format will, to the fullest extent possible, be made available upon a request from a person with a disability.



State of Wisconsin \ Department of Commerce

HEARING DRAFT of PROPOSED RULES

Rule No.: Chapter Comm 3

Relating to: Stop Work, Stop Use and Petition for Variance

Procedures

COM-10544 (N.03/97)

The Wisconsin Department of Commerce proposes an order to amend ch. Comm 3 (title), ss. Comm 3.001 to Comm 3.02, Comm 3.03 (1), (2) (e) Note 2 and (5) (a) to (e), Comm 3.04 (2) (b) Note and (7), Comm 3.06 (1) (c) Note; and to create ch. Comm 3 subch. I (title) and ch. Comm 3 subch. II, relating to stop work, stop use and petition for variance procedures and affecting small businesses.

ANALYSIS OF PROPOSED RULES

1. Statutes Interpreted.

Chapters 101 and 145, and sections 167.10 (6m), 168.16 (4) and 560.02 (4), Stats.

2. Statutory Authority.

Chapters 101 and 145, and sections 167.10 (6m), 168.16 (4) and 560.02 (4), Stats.

3. Related Statute or Rule.

None.

4. Explanation of Agency Authority.

Chapters 101 and 145 and section 167.10 (6m), Stats., grant the Department of Commerce the authority to protect public health, safety and welfare and the waters of the state by establishing reasonable and effective safety standards for the construction, repair and maintenance of public buildings and places of employment. Section 168.16 (4), Stats., grants the department authority to promulgate rules relating to the inspection of petroleum products. Section 560.02 (4), Stats., grants the department authority to promulgate rules to carry out the mandates in chapter 560, Stats, relating to the development of a state economic policy.

5. Summary of Proposed Rules.

The department implements the protection of the public and the waters of the state through the promulgation, administration and enforcement of administrative rules. These rules regulate objects and activities, require specific approvals and/or permits, and require credentialed individuals to perform certain activities. The department typically employs a philosophy of education first and enforcement second in its regulatory responsibilities. However, there are times when there is an imminent risk to public safety and health, and immediate enforcement action is warranted.

The proposed rules consist of revisions in chapter Comm 3 that add procedures for the Safety and Buildings Division to issue orders to immediately cease any construction, installation, operation or activity or the use of a building, building component, structure or mechanical device. Specific reasons are listed for the issuance of the orders. The proposed rules also contain procedures for review of the order by the division administrator, and for a hearing on the order by the department secretary.

The proposed rules also include revisions in the current chapter Comm 3 rules relating to the petition for variance procedures. Those procedures currently apply only to the Safety and Buildings Division within the Department. The proposed revisions will allow the petition for variance procedures to be used by the entire Department, not just the Safety and Buildings Division.

6. Summary of, and Comparison with, Existing or Proposed Federal Regulations.

There is no existing or proposed federal regulation that addresses the Safety and Buildings Division's issuance of stop work and stop use orders for the protection of public safety and health, or the department's processing of petitions for variance.

7. Comparison with Rules in Adjacent States.

An Internet search of adjacent states' rules found the following information relating to the issuance of stop work and stop use orders for the protection of public safety and health, and to the issuance of petitions for variance.

- The Illinois Department of Public Health, Division of Environmental Health, can issue stop work orders under the department's asbestos licensing program. The Illinois Environmental Protection Agency can issue stop work orders for non-compliance with loan or grant conditions and procedures under the agency's Brownfields Redevelopment Program and Public Water Supply Program. The Illinois Environmental Protection Agency can issue petitions for variance for relief from environmental regulations under certain circumstances.
- Under the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board regulations, an inspector has the right to stop installation work if standards for new tanks are not followed by the installer. Iowa's Administrative Code contains standards and a process for state departments to grant individual waivers from rules in response to a completed petition.
- Under Michigan's Food Law, Public Act 92, a stop work order can be issued against a proposed food establishment if applicable rules for the alteration or construction of the establishment are not met. The Michigan Department of Labor and Economic Growth Construction Code contains rules for the issuance of stop work orders, when work is being done contrary to the provisions of the code or in a dangerous or unsafe manner, under the Building Code, Plumbing Code, Mechanical Code and Existing Building Code. The Michigan

Electrical Code allows for the placement of a red tag on any electrical equipment that is found imminently dangerous to human life or property. The Michigan Department of Consumer and Industry Services can issue variances to the department's occupational safety and health standards.

- The Minnesota Department of Administration State Building Code contains rules for the issuance of stop work orders when work is being done contrary to the provisions of the code or in a dangerous or unsafe manner. The Minnesota State Building Code includes rules for plumbing, mechanical, electrical, energy, fuel gas, and existing buildings. Minnesota's administrative rules contain requirements and a process for state agencies to grant waivers and variances to any rule, except for a rule that incorporates a statutory requirement.

8. Summary of Factual Data and Analytical Methodologies.

There were no factual data or analytical methodologies used to develop the proposed rules.

9. Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of Economic Impact Report.

The proposed rules should have a minimal effect on small business. There were no supporting documents used to determine the effect on small business, and an economic impact report was not prepared.

SECTION 1. Chapter Comm 3 title is amended to read:

Chapter Comm 3
~~PETITION FOR VARIANCE~~ ADMINISTRATIVE PROCEDURES

SECTION 2. Chapter Comm 3 Subchapter I title is created to read:

Subchapter I - Petition for Variance Procedures

SECTION 3. Comm 3.001 to 3.02 are amended to read:

Comm 3.001 Purpose. The purpose of this ~~chapter~~ subchapter is to specify procedures for applying for a variance from a rule administered and enforced by the ~~division of safety and buildings in the~~ department. If the provisions of this ~~chapter~~ subchapter differ from those specified in the code containing the rule from which the variance is being requested, the most restrictive requirement shall govern.

Comm 3.002 Scope. This ~~chapter~~ subchapter specifies who may apply for a petition for variance from a rule, the procedures that must be followed when applying for and processing a petition for variance, and the procedures for appealing a decision on a petition for variance.

Comm 3.01 Petition procedures. Except as specified in ss. Comm 3.04 and 3.05, all petitions for variance from rules of the ~~division~~ department shall be processed as provided for in s. Comm 3.03. Appeals shall be handled as set forth in s. Comm 3.06.

Comm 3.02 Definitions. In this subchapter:

(1) "Administrator" means the ~~department~~ administrator of the ~~division of safety and buildings in the department of industry, labor and human relations commerce~~ administering and enforcing the rule being petitioned, or his or her designee.

(2) "Department" means the department of commerce.

(3) "Division" means the ~~division of safety and buildings~~ administering and enforcing the rule being petitioned.

(4) "Equivalency" means the same intent and degree of safety, health or public welfare as contained in the requirements specified in a rule.

(5) "Public employee" means any employee of the state, of any state agency or of any political subdivision of the state.

(6) "Public employer" means the state, any state agency or any political subdivision of the state.

(7) “Secretary” means the secretary of the department of commerce.

~~(8) “Significant ownership rights” means any person having ownership, control or custody of any structure, one or 2 family dwelling, place of employment or public building, or of the construction, repair or maintenance of any structure, one or 2 family dwelling, place of employment or public building.~~

~~(9)~~ **(8)** “Variance” means a specified alternative to or deviation from a rule.

SECTION 4. Comm 3.03 (1), (2) (e) Note 2, and (5) (a) to (e) are amended to read:

Comm 3.03 General variances. (1) SCOPE. Any person ~~having significant ownership rights~~ affected by a rule of the department may petition for a variance from ~~any the rule of the division~~. The petition for variance shall establish an equivalency which meets the intent of the rule being petitioned.

(2) (e) Note: The department forms required in this ~~chapter~~ section are available at no charge from the Safety and Buildings Division at ~~P.O. Box 7162, Madison WI 53707-7162, or at telephone 608/266-3151, the~~ Environmental and Regulatory Services Division at 608/266-7874, the Business Development Division at 608/266-9467, and the Community Development Division at 608/267-3895, and 608/264-8777 (TTY). Some of the department forms are also available from the ~~Division’s~~ department’s web site at www.commerce.state.wi.us www.commerce.wi.gov.

(5) TIME LIMIT FOR PROCESSING. (a) Except as provided in pars. (b) to (d), the ~~office~~ division shall review and make a determination on an application for a petition for variance within 30 business days of the receipt of the application and all forms, fees and other documents necessary to complete the review.

(b) Upon request of the petitioner and submittal of the required fee, the ~~office~~ division shall facilitate the review of a petition in less than the processing time specified in par. (a). The fee for this type of priority petition review shall be twice the fee required for the processing time specified in par. (a). The ~~office~~ division shall review and make a determination on an application for a priority petition for variance within 10 business days of the receipt of the application and all forms, fees and other documents necessary to complete the review.

(c) Petitions for variance from a rule contained in chs. Comm 20 to 25 shall be processed by the ~~office~~ division within 5 business days of receipt of the required information where a municipality administers and enforces the code, and within 15 business days of receipt of the required information where the division administers and enforces the code.

(d) Petitions for variance from a rule contained in ch. Comm 70 shall be processed by the ~~office~~ division within 10 business days of receipt of the required information.

(e) When additional information is requested by the ~~office~~ division to complete the review of the petition, the amount of time from the date of the request to the date of receipt by the ~~office~~

division of the information will not be included in the processing times specified in pars. (a) to (d). The full period for review specified in pars. (a) to (d) shall apply from the date of receipt of the additional information.

SECTION 5. Comm 3.04 (2) (b) Note and (7) are amended to read:

Comm 3.04 (2) (b) Note: The department forms required in this ~~chapter~~ section are available at no charge from the Safety and Buildings Division at P.O. Box 7162, Madison, WI 53707-7162, or at telephone 608/266-3151 and 608/264-8777 (TTY). Some of the department forms are also available from the Division's web site at ~~www.commerce.state.wi.us~~ www.commerce.wi.gov/SB.

(7) TIME LIMIT FOR PROCESSING. The ~~office~~ division shall process petitions submitted under this section as specified in s. Comm 3.03 (5).

SECTION 6. Comm 3.06 (1) (c) Note is amended to read:

Comm 3.06 (1) (c) Note: Requests for a review by the administrator may be forwarded to Administrator, Safety and Buildings Division, P.O. Box 2599, Madison, WI 53707-2599, or Administrator, Environmental and Regulatory Services Division, P.O. Box 7837, Madison, WI 53707-7837, or Administrator, Business Development Division, P.O. Box 7970, Madison, WI 53707-7970, or Administrator, Community Development Division, P.O. Box 7970, Madison, WI 53707-7970.

SECTION 7. Chapter Comm 3 Subchapter II is created to read:

Subchapter II - Stop Work and Stop Use Procedures

Comm 3.10 Purpose. The purpose of this subchapter is to specify procedures used by the division of safety and buildings in the department when issuing stop work orders or stop use orders as part of the division's responsibility to protect public safety and health and the waters of the state.

Note: Where statutory provisions specify other procedures for issuing orders for the immediate protection of safety and health, those provisions take precedence over these rules.

Comm 3.11 Scope. This subchapter specifies the reasons and the procedures for issuing a stop work order or stop use order, and the procedures for a review and appeal of the order.

Comm 3.12 Definitions. In this subchapter:

(1) "Administrator" means the administrator of the division of safety and buildings in the department, or his or her designee.

(2) "Department" means the department of commerce.

(3) "Division" means the division of safety and buildings.

(4) “Secretary” means the secretary of the department.

Comm 3.13 Stop Work and Stop Use Procedures. (1) REASONS FOR ISSUANCE.

Pursuant to the statutory goals regarding the protection of public safety and health enumerated under chs. 101, 145 and 167, Stats., the division may, without advance written notice, issue an order to immediately cease any construction, installation, operation, or activity or the use of a building, building component, structure or mechanical device for any of the following reasons:

(a) There is reasonable cause to believe that the construction, installation, activity, existing condition or method of operation creates an imminent danger to public safety or health.

(b) The activity is being performed or conducted by an individual who does not hold the appropriate license, certification or registration as required by statute or administrative rule administered by the division.

(c) The construction, installation, activity or operation has not been approved or been issued the appropriate permit as required by statute or administrative rule administered by the division.

(2) ISSUANCE OF ORDER. (a) A stop work order or stop use order shall remain in effect until the conditions of the order are fulfilled, or the order is rescinded or overturned under either sub. (3) or (4).

(b) A stop work order or stop use order shall be in writing and shall include instructions for appealing the order.

(c) The division may post a sign or notice to the public regarding the issuance of a stop work order or stop use order. The sign or notice shall remain where posted until the conditions of the order are fulfilled, or the order is rescinded or overturned under sub. (3) or (4).

(3) REVIEW BY THE ADMINISTRATOR. (a) The recipient of a stop work order or stop use order or any person who is adversely affected by a stop work order or stop use order may request a review of the order by the administrator.

(b) A request for a review of a stop work order or stop use order by the administrator shall be in writing and shall include a statement of the specific reasons why the person believes that the issuance of the order is incorrect or inappropriate.

Note: Requests for a review by the administrator may be sent to Administrator, Safety and Buildings Division, P.O. Box 2599, Madison, WI 53701-2599, or Email at SB@commerce.state.wi.us.

(c) The request for a review of a stop work order or stop use order shall be denied if the request for review is received more than 30 days after the date of the order.

(d) 1. The administrator shall make a decision on the request to review the issuance of a stop work order or stop use order within 5 business days of receipt of the request.

2. If the administrator determines that insufficient reasons are provided in the request for a review of a stop work order or stop use order, the request may be denied.

3. The denial of a review of a stop work order or stop use order shall be in writing and shall state the reasons for denial and include information about the right to appeal the denial.

4. If the administrator determines that sufficient reasons are provided in the request for a review of a stop work order or stop use order, the request shall be granted.

5. If the administrator grants the request for a review of a stop work order or stop use order, the administrator shall notify the person making the request in writing of the date, time and location where the review will take place and who will conduct the review. The review shall be held within 10 days after the request for review is granted, unless the person requesting the review asks for and is granted an extension.

6. If a review of a stop work order or stop use order is granted, the person requesting the review shall be provided an opportunity to meet with the administrator to present statements and documents regarding the order.

(e) The administrator shall issue a written decision within 5 business days following a review of a stop work order or stop use order.

(f) The written decision from the administrator shall include information about appeal rights and procedures if the decision adversely affects the person requesting the review.

(4) HEARING BY THE SECRETARY. (a) A person adversely affected by the decision of the administrator on the issuance of a stop work order or stop use order may request a hearing on the order by the secretary.

(b) A request for a hearing to review the decision of the administrator regarding a stop work order or stop use order shall be made in writing to the secretary.

(c) A request for a hearing to review the decision of the administrator regarding a stop work order or stop use order shall include a statement of the specific reasons why the person believes the decision is incorrect or inappropriate.

(d) A request for a hearing to review the decision of the administrator regarding a stop work order or stop use order shall be denied if the request is received more than 30 days after issuance of the decision.

(e) A hearing held by the secretary or designee to review the decision of the administrator regarding a stop work order or stop use order shall be a contested case hearing. The hearing and the decision issued after the hearing shall be governed by the provisions of ch. 227, Stats.

Note: Requests for a contested case hearing may be sent to the Department of Commerce Legal Counsel, P.O. Box 7970, Madison, WI 53707-7970.

END

EFFECTIVE DATE

Pursuant to s. 227.22 (2) (intro.), Stats., this rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register.
